

## STATE OF VERMONT

In re ) Fair Hearing No. A-11/08-522  
 )  
 Appeal of )

# INTRODUCTION

The petitioner appeals a decision by the Department for Disabilities, Aging and Independent Living (DAIL) terminating her eligibility for participation in the Choices for Care (CFC) program. The issue is whether DAIL's decision to terminate CFC eligibility is correct under the regulations.

The petitioner filed her appeal on November 14, 2008. A telephone status conference was held on December 1, 2008. The parties indicated that the basic facts are not in dispute. A schedule was set up for DAIL to file a Motion for Summary Judgment and supporting memorandum and for petitioner to respond to the Motion. Time was built into the schedule to allow petitioner the opportunity to seek legal advice. DAIL filed their Motion; the petitioner did not file a response.

The decision is based upon the information from the appeal, status conference, and DAIL's Motion and supporting materials.

## FINDINGS OF FACT

1. The petitioner is a thirty-four year old individual who was seriously injured in an automobile accident eight years ago. Petitioner is a paraplegic.

2. Petitioner has received CFC services for several years. The petitioner has improved over time.

3. Prior to petitioner's most recent reassessment in October 2008, DAIL granted petitioner a waiver for continuation of CFC services in April 2008. DAIL had found that petitioner no longer met the eligibility criteria for the high or highest needs services based on information from petitioner that she only needed limited assistance with several activities of daily living (ADLs); DAIL agreed to a waiver request from petitioner's case manager to continue services because petitioner's case manager indicated there had been periods of decline and continued services were necessary to stabilize petitioner.

4. Petitioner submitted a reassessment request on or about October 13, 2008 to DAIL. The reassessment was submitted by T.O., petitioner's case manager through Franklin County Home Health Agency.<sup>1</sup> T.O. rated petitioner as independent for the following ADLs: dressing, personal

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<sup>1</sup> The case managers usually meet with the recipient to fill out the reassessment paperwork.

hygiene, bed mobility, adaptive devices, mobility and eating. T.O. rated petitioner as needing limited assistance with the following ADLs: bathing, toilet use and transferring. In addition, T.O. indicated that petitioner needed assistance with meal preparation.

Part of the reassessment packet is an Independent Living Assessment (ILA). The ILA details the type of assistance an individual needs. On petitioner's ILA, the following details were given:

(a) Bathing. Petitioner needs help to get in/out of the shower. Petitioner should shower only when the personal care attendant (PCA) is present.

(b) Toilet use. Four times a week, the PCA physically places a slide board for transfers. Petitioner struggles with transfers from toilet to chair.

(c) Transferring. Petitioner needs help transferring from wheelchair into car because there is a difference in height between the chair and car seat. PCA positions slide board and assists as needed.

In addition, the ILA indicated that petitioner had not been hospitalized during the previous twelve months nor had her condition been unstable.

5. DAIL sent petitioner a Termination Notice on November 6, 2008 informing petitioner that her CFC services would terminate November 17, 2008. Petitioner appealed

before the operative termination date; benefits have continued.

6. Petitioner wrote in her appeal letter:

I require assistance doing some daily tasks. Although I can dress and bath myself I need help getting in and out of the shower do to the set up of my bathroom. I also cannot do my dishes or laundry because my apartment isn't totally accessible. The washer and dryer are in the basement and the sink in the kitchen is much too high and isn't set up properly for me to do my own dishes. I am unable to vacuum and mop on my own do to the fact that I am unable to move things around to clean thoroughly.

Petitioner explained that she did not want the Vermont Center for Independent Living to make her apartment accessible since she hopes to be approved for a Section 8 home ownership program and then find a house.

7. A Commissioner's Review was held on November 20, 2008. A written decision affirming the termination was issued on December 9, 2008.

#### ORDER

DAIL's Motion for Summary Judgment is granted and DAIL's decision to terminate petitioner's eligibility for the CFC program is affirmed.

#### REASONS

A Motion for Summary Judgment is a mechanism that allows the trier to determine whether the case can be decided

without an evidentiary hearing. Summary judgment is appropriate when material facts are not in dispute and the moving party is entitled to judgment as a matter of law.

V.R.C.P. 56. See Gore v. Green Mountain Lakes, Inc., 140 Vt. 262 (1981); Wesco, Inc. v. Hay-Now, Inc., 159 Vt. 23 (1992); and Messier v. Metropolitan Life Insurance Co., 154 Vt. 406 (1990).

The parties are in agreement that petitioner is a paraplegic. There is no disagreement regarding the level of assistance petitioner needs with all her ADLs including the need for limited assistance with bathing, toilet use, and transferring. Petitioner submitted materials showing no hospitalizations for the prior twelve month period nor showing any sudden declines during the prior twelve month period.

The remaining question is whether DAIL is entitled to judgment as a matter of law.

DAIL operates the Choices for Care (CFC) program through a waiver from the Centers for Medicare and Medicaid Services. The primary goal of the CFC program is to provide individuals who need nursing home level care with a choice of remaining in the community by providing home health care for Activities

of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs). CFC Regulations Section I.

The eligibility criteria are set out at CFC Regulations Section IV.<sup>2</sup> Section IV.A.2 states that to be eligible:

...an individual must have a functional physical limitation resulting from a physical condition (including stroke, dementia, traumatic brain injury, and similar conditions) or associated with aging.

DAIL has created categories of need including Highest Needs and High Needs. The pertinent issue is whether DAIL is correct under the regulations that petitioner does not meet the eligibility criteria for the Highest or High Needs groups.

In terms of the Highest Needs Group, CFC Regulation Section IV.B.1.b states, in part:

Individuals who apply and meet any of the following eligibility criteria shall be eligible...

i. Individuals who require **extensive or total assistance** with at least one of the following Activities of Daily Living (ADLs): toilet use, eating, bed mobility; or transfer, and require *at least* limited assistance with any other ADL. (emphasis added.)

In terms of the High Needs group, CFC Regulation Section IV.B.2.b states:

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<sup>2</sup>This appeal does not involve the Moderate Needs Group. There are separate eligibility criteria for Moderate Needs. Petitioner may qualify for this group.

Individuals who meet any of the following eligibility criteria shall be eligible for the High Needs group and may be enrolled in the High Needs group:

i. Individuals who require **extensive to total assistance** on a daily basis with at least one of the following ADLs:

Bathing	Dressing
Eating	Toilet Use
Physical Assistance to Walk	
(emphasis added.)	

An individual requiring only limited assistance with bathing, toilet use or transferring does not meet the criteria in the above regulations.

Based on the foregoing, DAIL's Motion for Summary Judgment is granted and their underlying decision to terminate petitioner's eligibility for CFC services is affirmed. 3 V.S.A. § 3091(d), Fair Hearing No. 1000.4(D).

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